

**BEFORE THE
RESPIRATORY CARE BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation and Petition to
Revoke Probation Against:

STEVEN ANTHONY SMITH
5770 W. Centinela Avenue, Apt. #202
Los Angeles, CA 90045

Case No.: D1 2004 10

OAH No.: 2008070413

DECISION AND ORDER

The proposed Decision of the Administrative Law Judge was adopted by the Respiratory Care Board of California, Department of Consumer Affairs, as its Decision in the above entitled matter. Said Decision was ordered January 9, 2009, to become effective January 16, 2009.

Respondent filed a petition for reconsideration of the Respiratory Care Board's decision on January 15, 2009, prior to the effective date of the decision.

The Respiratory Care Board ordered a stay of the effective date for 10 days, solely for the purpose of considering the Petition.

The Petition, having been submitted for consideration to the Respiratory Care Board was denied.

The attached Decision of the Administrative Law Judge is hereby adopted by the Respiratory Care Board as its Decision in the above entitled matter, effective January 26, 2009.

IT IS SO ORDERED January 26, 2009.

Original Signed By
LARRY L. RENNER, BS, RRT, RCP, RPFT
PRESIDENT, RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

BEFORE THE
RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition to Revoke Probation
Against:

STEVEN ANTHONY SMITH

Respiratory Care Practitioner License No. 24213,

Respondent.

Case No. D1 2004 10

OAH No. 2008070413

PROPOSED DECISION

This matter was heard on November 13, 2008, at the Office of Administrative Hearings in Los Angeles, California. Janis Rovner, Administrative Law Judge, presided. Richard D. Marino, Deputy Attorney General, represented Stephanie Nunez (Complainant). Steven Anthony Smith (Respondent) was present throughout the hearing and represented himself.

Oral and documentary evidence was received, argument was heard, and the matter was submitted on November 13, 2008. The Administrative Law Judge makes her factual findings, legal conclusions and order, as follows:

FACTUAL FINDINGS

Jurisdiction and Parties

1. On March 19, 2008, Complainant Stephanie Nunez filed the Petition to Revoke Probation while acting in her official capacity as Executive Officer of the Respiratory Care Board of California (Board), Department of Consumer Affairs.

2. On March 23, 2005, the Board issued Respiratory Care Practitioner License Number 24213, to Respondent. The license is in full force and effect and will expire on November 30, 2009, unless renewed.

3. (A) In a disciplinary action entitled *In the Matter of the Statement of Issues Against Steven Anthony Smith*, Case No. S-345, the Board issued a decision, effective March 23, 2005, in which Respondent was issued a probationary license for three years, subject to specified terms and conditions.

(B) Condition 15 of Respondent's probation states in pertinent part:

If a petition to revoke probation is filed against Respondent during probation, the Board shall have continuing jurisdiction and the period of probation shall be extended until the matter is final.

(C) Jurisdiction exists for Complainant to proceed in this matter: The Petition to Revoke Probation was filed before the three-year probationary period expired, thereby extending the period of probation pursuant to Condition 15.

(D) Respondent requested a hearing on the Petition to Revoke Probation and this matter ensued.

Background

4. Before issuing the probationary license to Respondent as provided in Factual Finding 3, the Board originally refused to grant Respondent's application for a respiratory care practitioner license based on his felony convictions in July 2004, for violating Health and Safety Code section 11351.1 (possession of cocaine base for sale) and Health and Safety Code section 11359 (possession of marijuana for sale). In light of his convictions, the Board would only issue a probationary license to Respondent. In order to receive his license, Respondent signed a stipulated settlement with the Board in which he admitted his convictions and agreed to the specific terms and conditions of his probation.

Violations of Probationary Conditions

5. (A) At all relevant times, Condition 2 of Respondent's probation stated:

Respondent, at his expense, shall participate in random testing, including, but not limited to, biological fluid testing (i.e., urine, blood, saliva), breathalyzer, hair follicle testing, or a drug screening program approved by the Board. Test costs range from \$21.00 to \$200.00 each. The length of time shall be for the entire probation period. The frequency and location of testing will be determined by the Board.

At all times, Respondent shall fully cooperate with the Board or any of its representatives, and shall when directed, appear for testing as requested, and submit to such tests and samples for the detection of alcohol, narcotics, hypnotics, dangerous drugs or other controlled substances.

If Respondent is unable to provide a specimen in a reasonable amount of time from the request, while at the work site, Respondent understands that any Board representative may request from the supervisor, manager or director on duty to observe Respondent in a manner that does not interrupt or jeopardize patient care in any manner, until such time Respondent provides a specimen acceptable to the Board.

Failure to submit to testing or appear as requested by any Board representative for testing, as directed, shall constitute a violation of probation, and shall result in the filing of an accusation and/or petition to revoke probation against Respondent's respiratory care practitioner license.

(B) As part of Respondent's random drug testing program pursuant to Condition 2, he was required to telephone Compass Vision, Inc. (CVI) on a daily basis to determine if he needed to provide a specimen for testing and analysis. He failed to telephone CVI on November 6 and 25, 2007; December 13, 15, 18, 25, and 28, 2007; January 13, 14, 16, and 26, 2008; and February 2, 6, 24 and 26, 2008, in violation of Condition 2 of his probation.

(C) Pursuant to Condition 2 of his probation, Respondent was required to provide a specimen for testing and analysis on January 5, 2006; March 20, 2006; December 27 and 29, 2007; January 2 and 9, 2007; February 2 and 19, 2007; November 30, 2007; December 17, 2007; and January 2, 2008.¹ Respondent failed to provide a specimen on those dates, thereby violating Condition 2 of his probation.

(D) Respondent's probationary terms required him to pay a fee in the range of \$21.00 to \$200, to CVI for specimen testing and analysis. His CVI account was on hold for failing to pay for testing and analysis on January 5, 2006; March 20, 2006; December 17, 2007; and January 2, 2008. As a result, Respondent may have given specimens on those dates, but CVI did not test and analyze the specimens because his CVI account was in arrears.

¹ Complainant did not prove that Respondent failed to provide a specimen on March 10, 2007, as required. Exhibit 6 contained conflicting information on this issue.

(E) Respondent's CVI account was also on hold for failing to pay for testing and analysis from November 30, 2005 through December 12, 2005; from January 3, 2006 through January 23, 2006; from January 15, 2007 through February 15, 2007; and from December 8, 2007 through January 9, 2008.

6. (A) At all times after the effective date of Respondent's probation, Condition 3 stated:

Respondent shall completely abstain from the possession or use of alcohol, controlled substances, dangerous drugs, any and all other mood altering drugs, substances and their associated paraphernalia, except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment.

Respondent shall execute a release authorizing the release of pharmacy and prescribing records as well as physical and mental health records. Respondent shall also provide information of treating physicians, counselors or any other treating professionals as requested by the Board

Respondent shall ensure that he is not in the presence of or in the same physical location as individuals who are using illegal substances, even if Respondent is not personally ingesting the drug(s).

Any positive result that registers over the established laboratory cutoff level shall constitute a violation of probation and shall result in the filing of an accusation and/or petition to revoke probation against Respondent's respiratory care practitioner license.

Respondent also understands and agrees that any positive result that registers over the established laboratory cutoff level shall be reported to each of Respondent's employers.

(B) On February 17, 2006, Respondent appeared at a collection site to provide a urine specimen for testing and analysis in accordance with his probation monitoring program. The laboratory report from Compass Vision Inc. (CVI) revealed that he tested positive for Ethyl Glucuronide at a level of 520 nanograms per milliliter (ng/mL), indicating that he consumed alcohol, in violation of Condition 3. The 520 ng/mL was above the established laboratory cutoff level of 250 ng/mL.

(C) On March 7, 2006, Respondent's Board Probation Monitor sent him a letter by certified mail, noting his positive test for Ethyl Glucuronide on February 17, 2006, and reminding him that, pursuant to the terms of his probation, he must abstain from the use of alcohol. The letter also noted that Respondent had failed to telephone CVI, as required by his probationary terms, on at least 19 occasions between July 15, 2005 and March 7, 2006. The letter further informed Respondent that it served as a final warning and that any future violation would result in further disciplinary action.

(D) On January 24, 2008, Respondent provided a urine specimen for testing and analysis in accordance with his probation monitoring program. CVI's laboratory report revealed that he tested positive for Ethyl Glucuronide at a level of 4000 ng/mL, indicating he had consumed alcohol, in violation of Condition 3. The 4000 ng/mL was above the established laboratory cutoff level of 250 ng/mL.

(E) Respondent submitted a Drug Questionnaire to the Board, dated February 11, 2008, signed under penalty of perjury. He answered "Yes" to question number 5, which reads, "In the last 3 weeks have you consumed alcohol?" He admitted he had consumed a Mai Tai on January 24, 2008.

7. (A) At all times after the effective date of Respondent's probation, Condition 8 stated:

All costs incurred for probation monitoring during the entire probation shall be paid by the Respondent. The monthly cost may be may be adjusted as expenses are reduced or increased. Respondent's failure to comply with all terms and conditions may also cause this amount to be increased.

All payments for costs are to be sent directly to the Respiratory Care Board and must be received by the date(s) specified. (Periods of tolling will not toll the probation monitoring costs incurred.)

If Respondent is unable to submit costs for any month, he shall be required instead to submit an explanation of why he is unable to submit the costs and the date(s) he will be able to submit the costs including payment amount(s). Supporting documentation and evidence of why the Respondent is unable to make such payment(s) must accompany this submission.

Respondent understands that failure to submit costs timely is a violation of probation, and submission of evidence demonstrating financial hardship does not preclude the Board from pursuing further disciplinary action. However,

Respondent understands providing evidence and supporting documentation of financial hardship may delay further disciplinary action.

In addition to other disciplinary action taken by the Board, an unrestricted license will not be issued at the end of the probationary period and the respiratory care practitioner license will not be renewed, until such time all probation monitoring costs have been paid.

The filing of bankruptcy by Respondent shall not relieve the Respondent of his responsibility to reimburse the Board for costs incurred.

(B) Respondent is delinquent in payment of probation monitoring costs to the Board in the sum of \$4,250, in violation of Condition 8 of his probation.

Mitigation

8. Respondent, who is now 41-years old, was brought up in a neighborhood of Inglewood, California, in which gangs and violence were prevalent. In his youth, Respondent was involved with gangs and crime. He sold drugs to support his family. When he was 30-years old, he attended El Camino Junior College and eventually received his associate of arts degree in science.

9. Respondent has not had any problems while working as a respiratory care practitioner. He worked hard to become a respiratory care practitioner and enjoys the work very much. After his conviction in July of 2004, he is no longer involved with gangs and crime. He is involved in the community as a mentor to youth, stressing the importance of education. He also volunteers his time coaching youth football.

10. In support of his good character, Respondent offered letters from friends and acquaintances attesting to his integrity, his commitment to the community, and his ability as a respiratory care practitioner.

11. At the hearing, Respondent admitted violating the probationary conditions alleged in the Petition to Revoke Probation. However, he also complied with other probationary conditions, including submitting quarterly reports (Condition 6) and obeying all laws (Condition 5).

Other Factors

12. (A) Soon after he received his probationary license, the Board's probation monitor explained the details of Respondent's probationary conditions to him and Respondent indicated that he understood each and every probationary term and condition. There is no question that Respondent understood all of the terms and conditions of his probation.

(B) Although he understood the probationary conditions and agreed to comply with them when he entered into the stipulated settlement, he claimed that he could not comply with the Board's probationary conditions because they were too stringent. While Respondent admits that he sold drugs before his conviction in July of 2004, he also credibly pointed out at the hearing that he did not, and does not, have a problem with alcohol or drug abuse. Therefore, he felt that the probationary conditions requiring him to telephone CVI daily and submit to random alcohol and drug testing were too onerous.

(C) Respondent had himself placed on the waiting list to participate in outpatient drug treatment at the Didi Hirsch Community Mental Health Center a few days before the hearing, even though he disclaims problems with drug and alcohol abuse, just to show the Board that he understands the seriousness of this proceeding.

13. (A) After receiving his probationary license, Respondent was employed full-time for about one year during 2005 and 2006, as a respiratory care practitioner at Little Company of Mary Hospital in Torrance, California. He then began working for a registry and the work has been very slow. Without steady work, his financial situation deteriorated. Recently, on a monthly basis, he has been facing eviction from his apartment because he is unable to pay the rent. In addition, his marriage of eight years is now ending in divorce.

(B) Respondent admits he did not pay his probation monitoring costs. He made the first eight payments of \$100 per month through November of 2005, but he states that he could not afford to continue making payments thereafter, especially when the monthly costs were increased in August of 2007 from \$100 per month to \$150 per month. He paid no probation monitoring costs after November of 2005. He now owes accrued probation monitoring fees of \$4250. The Board's probation monitor advised Respondent on several occasions to submit documents supporting a request for financial hardship in accordance with Condition 8 of his probationary terms. Respondent said he would, but he failed to do so.

(C) As provided in Factual Findings 5(D) and (E), above, Respondent has also had problems paying required fees to CVI for testing and analysis. Respondent also admitted that he missed telephoning CVI, but stated that he sometimes called after hours when the automated phone system was not working and did not log in his calls.

(D) Condition 12 of Respondent's probation required him to pay \$1,365 for investigation and costs associated with the case referred to in Factual Finding 3(A), no later than March 23, 2006. Respondent paid the Board a total of \$1163.25 from June 2005 through December 2005, but never paid the balance of \$201.75.

(E) Respondent's lack of financial resources may have affected his ability to pay probation monitoring costs, and it may have caused him to fail to provide specimens in some instances because his account was on hold. However, it is not responsible for his positive test results (Factual Finding 6), his failure to telephone CVI, or his failure to supply all specimens (Factual Finding 5).

14. Even after Complainant filed the Petition to Revoke Probation in March of 2008, Respondent failed to comply with Conditions 2, 3 and 8 of his probationary terms. He failed to telephone CVI on 27 occasions between April 27 and August 20, 2008; he failed to provide specimens for testing and analysis on April 11 and July 12, 2008; and he failed to pay any probation monitoring costs.

15. On July 13, 2008, Respondent appeared at a collection site to provide a urine specimen for testing and analysis in accordance with his probation monitoring program. The laboratory report from Compass Vision Inc. (CVI) revealed that he tested positive for Ethyl Glucuronide at a level of 4400 nanograms per milliliter (ng/mL), indicating that he consumed alcohol, in violation of Condition 3. The 4400 ng/mL was above the established laboratory cutoff level of 250 ng/mL. After this test, the Board's probation monitor asked Respondent to submit a Drug Questionnaire indicating the reason for the positive test result. Respondent submitted the document on August 14, 2008, indicating that he had taken Nyquil and Theraflu, but had not consumed any alcohol.

Costs of Enforcement

16. Complainant incurred reasonable prosecution costs in this proceeding of \$1,615.50.

17. Complainant also seeks reimbursement for probation monitoring costs, and cost recovery required pursuant to Condition 12 of his probation, in the sum of \$4211.75.

LEGAL CONCLUSIONS

1. Pursuant to Business and Professions Code section 3754, the board may deny an application for, or issue with terms and conditions, or suspend or revoke, or impose probationary conditions upon, a license in any decision made after a hearing.

2. Cause exists to revoke Respondent's probation and revoke his probationary respiratory care practitioner license for violating Conditions 2, 3 and 8 of his probation, separately, and as a whole, as set forth in Factual Findings 5 through 7 and Legal Conclusion 1.

3. Pursuant to Business and Professions Code sections 3753.5, subdivision (a), and 3753.7, the administrative law judge may direct Respondent to pay the Board its reasonable prosecution costs in this matter.

4. Cause exists pursuant to Business and Professions Code section 3753.5 to order Respondent to pay the Board's prosecution costs in this matter, in the total amount of \$1,615.50, by reason of Factual Findings 3 through 7 and 16, and Legal Conclusions 1 and 2.

In *Zuckerman v. State Board of Chiropractic Examiner* (2002) 29 Cal.4th 32 (2002), the Supreme Court rejected a constitutional challenge to a cost regulation similar to section 3753.5. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost provision did not deter individuals from exercising their right to a hearing. Thus, the board must not assess full costs where it would unfairly penalize the respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the board must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the board must consider a respondent's ability to pay; and the board may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. (*Zuckerman, id.* at p. 45.)

In this case, Respondent has demonstrated his inability to pay. He is working only sporadically, has not been able to pay his apartment rent on time and did not pay his probation monitoring costs while on probation (Factual Findings 5, 7 and 13). This inability to pay is sufficient under *Zuckerman* to relieve Respondent of the obligation to pay the Board's costs of prosecution

5. Respondent has been a licensed respiratory therapist for just over three and one-half years. For the entire time of his licensure, he has been on probation with the Board. Respondent offered compelling evidence of his personal triumph over his involvement with gangs and crime, his contributions to his community, and his good character. However, the evidence did not establish that extending Respondent's probation would make him more likely to comply with his probationary terms. Beginning in November 2005, he failed to pay any probation monitoring costs. After the Board filed its Petition to Revoke Probation, Respondent took no steps to comply with his probationary terms or give some sign to the Board that he understood the seriousness of his failure to comply. Respondent never formally contacted the Board to ask it to modify his probationary terms due to financial hardship, although the Board's probation monitor advised him at least two times to do so. Moreover, Respondent gave little explanation for his failure to telephone CVI or submit

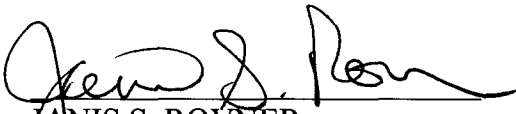
specimens, as his probationary terms required. Respondent is desperate to retain his license for financial and other reasons, and he does not want to disappoint those who look up to him. That is understandable, but in this matter there is simply little evidence to show that he would comply with any reasonable terms of probation, even if some of the terms were modified. Given the foregoing, the order that follows is necessary for the protection of the public health, safety and welfare.

6. The Board seeks to recover Respondent's accrued probation monitoring costs and the unpaid cost recovery he agreed to pay under his probationary terms, in the amount of \$ 4211.75 (see Factual Findings 7, 13, and 17). The actual accrued probation monitoring costs as of the date of hearing were \$4250, as established by Complainant. These costs are not recoverable pursuant to Business and Professions Code section 3753.5, because they are not investigative or prosecution costs incurred in this proceeding. They are costs related to Respondent's probation. Moreover, the Board's prayer for relief in this matter requested payment of probation monitoring costs only if probation is continued or extended. The Order herein does not recommend that Respondent's probation be continued or extended. Therefore, it would not be appropriate to require Respondent to pay accrued probation monitoring costs or the cost recovery from his prior case of \$201.75.

ORDER

The Petition to Revoke Probation is granted. Respiratory Care Practitioner License Number 24213, issued to Steven Anthony Smith, is hereby revoked.

DATED: December 15, 2008


JANIS S. ROVNER
Administrative Law Judge
Office of Administrative Hearings